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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EPIFANIO AGUILERA,

Defendant and Appellant.

E048728

(Super.Ct.No. FSB805073)

OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas M. Elwell,
Judge. Affirmed as modified.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck,
and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

In a felony complaint, the San Bernardino County District Attorney charged defendant and appellant Epifanio Aguilera with witness dissuasion in violation of Penal Code¹ section 136.1, subdivision (b)(1) (count 1); and second degree burglary of a vehicle in violation of section 459 (count 2). The complaint alleged defendant was previously convicted of two serious or violent felonies within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i); and two serious felonies within the meaning of section 667, subdivision (a)(1). The complaint also alleged defendant had two prison priors within the meaning of section 667.5, subdivision (b).

Prior to the preliminary hearing, the parties entered into a plea agreement. Defendant pled guilty to count 1, admitted one prior strike allegation, and admitted two prior serious felony allegations, for a total prison sentence of 16 years. In exchange, the prosecutor agreed to dismiss count 2, strike the remaining prior conviction allegations, and delete a fine in a separate case at the time of sentencing.

In accordance with the plea agreement, the trial court sentenced defendant to 16 years in state prison. The sentence consisted of six years for count 1 (the upper term doubled for the prior strike), plus 10 years for the two prior serious felony convictions.

¹ All statutory references are to the Penal Code unless otherwise specified.

The court imposed a \$200 restitution fine and stayed an equivalent parole revocation fine. Defendant received 289 days of presentence custody credit.

On appeal,² defendant contends, and the People agree, that the abstract of judgment must be modified. We affirm and modify.

II

FACTUAL³ AND PROCEDURAL HISTORY

On December 14, 2008, Omar Calleja bought a truck from his neighbor, Alfred Lee, for \$3,000. Approximately three days later, Lee threatened to come to Calleja's home and break all his windows or do something else to him if Calleja did not return the truck. Calleja returned the truck because his wife was scared. A couple of days later, Lee demanded more money from Calleja; Calleja gave Lee an additional \$500.

On December 21, 2008, defendant, one of Lee's friends, went to Calleja's house. Defendant asked Calleja to come outside and talk to him. When Calleja locked the door and refused to go outside, defendant said, "Okay, I will come back, you know me."

Approximately six minutes later, defendant returned and broke the windows of a truck belonging to Jose Cisneros, Calleja's brother in law. Defendant removed the stereo from the truck. Calleja yelled at defendant. Defendant replied, "If you call the police on

² After defendant filed his initial notice of appeal, he filed a second notice with a request for certificate of probable cause; he alleged ineffective assistance of counsel. The trial court denied the request for certificate of probable cause. Defendant does not address the second notice of appeal in his opening brief.

³ Because defendant pled guilty prior to the preliminary hearing, the factual background is derived from the sheriff's report, which the trial court reviewed as the factual basis for the plea.

me and they catch me, I will be back to kill you and your family.” Defendant then drove away in his own vehicle. Calleja feared for his and his family’s safety.

Defendant was stopped a short time later with the stolen stereo in his vehicle. He also had a military-type hatchet in his pant pocket. Cisneros identified the stereo as his property and Calleja identified defendant.

III

ANALYSIS

Defendant’s sole contention on appeal is that the trial court erred in failing to dismiss count 2, and to strike the prison prior allegations in its oral pronouncement of judgment, in accordance with the plea agreement. Defendant, therefore, contends that we should order that the record be corrected to reflect the trial court’s omissions. The People agree with defendant.

In this case, defendant pled guilty to count 1, admitted one prior strike allegation, and admitted the two prior serious felony allegations for a total prison sentence of 16 years. In exchange, the prosecutor agreed to dismiss count 2, strike the remaining prior conviction allegations, and delete a fine in a separate case at the time of sentencing.

At the sentencing hearing, the trial court expressly stated that it was sentencing defendant pursuant to the terms of the plea agreement between the parties. The court thereafter sentenced defendant to six years for count 1 (the upper term of three years doubled under the two strikes law), and 10 years for the two prior serious felony convictions, for a total sentence of 16 years. The court then dismissed a fine in

defendant's other case. The court, however, failed to dismiss count 2 or strike the remaining prior conviction allegations in its oral pronouncement of judgment.

Notwithstanding the oral pronouncement of judgment, the minute order does state that count 2 was ordered dismissed, and the prison prior allegations were stricken. There are no references to count 2 or the prison priors in the abstract of judgment.

“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) “The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order and the abstract of judgment.” (*Id.* at pp. 387-388.) Therefore, the trial court's notation in the minutes that count 2 and the prison priors were dismissed on the People's motion is invalid.

However, where an error in the oral pronouncement of sentence is the result of judicial inadvertence, and obviously contrary to the trial court's intentions, the reviewing court may correct the error on its own motion at any time. (See *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295 [Fourth Dist., Div. Two].) In *Menius*, we ordered the abstract of judgment corrected because the trial court made “an obviously inadvertent misstatement” in pronouncing judgment under the wrong enhancement statute. (*Ibid.*)

Similarly, in this case, the record shows that the trial court intended to fully execute the terms of the plea agreement, but inadvertently neglected to dismiss count 2 and the prison priors during the oral pronouncement of judgment. Accordingly, we shall order that the judgment be modified to dismiss count 2 and to strike the prison priors.

Furthermore, we agree with the People that the abstract of judgment fails to reflect that defendant was sentenced under the two strikes law under sections 667, subdivisions (b) through (i), and 1170.12. Here, the trial court indicated that defendant's sentence was calculated under the two strikes law. The court, however, failed to state this in the abstract of judgment. As stated above, the abstract of judgment and minutes must conform to the oral pronouncement of judgment. (*People v. Zackery, supra*, 147 Cal.App.4th at p. 385.) Therefore, we shall order that the judgment be modified to state that the sentence for count 1 was imposed under the two strikes law.

IV

DISPOSITION

The judgment is modified as follows: (1) to dismiss count 2; (2) to strike the prison priors; and (3) to state that the sentence for count 1 was imposed under the two strikes law. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect this modification and to forward certified copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Richli
J.

/s/ Miller
J.